

DISTRICT OF MAINE

V.

Defendant

Civil No. 89-0079 P

AMENDED REPORT AND RECOMMENDED DECISION²

This Social Security Disability appeal presents the issue whether the Secretary erred in deciding that the plaintiff is not entitled to a retroactive restoration of a portion of his disability insurance benefits which has been offset (due to his receipt of workers' compensation payments) pursuant to 42 U.S.C. ' 424a(a)(2). The question is whether the plaintiff's payment of attorneys' fees pursuant to a court-approved settlement agreement in a third-party action constitutes actual repayment of the

¹ This Report and Recommended Decision is amended to include the third and fourth lines on page 3 which were inadvertently omitted from the Report and Recommended Decision dated February 26, 1990.

² This action is properly brought under 42 U.S.C.A. ' 405(g). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court, pursuant to Local Rule 12 which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision, and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on January 23, 1990 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

insurer's lien in the third-party action so as to place the plaintiff, pursuant to the Secretary's Program Operations Manual System ("POMS"), within a class of workers' compensation recipients to whom the offset does not apply.

Following a hearing, the Administrative Law Judge found that the plaintiff is a recipient of disability insurance benefits based on a period of disability which began on August 19, 1981, Finding 1, Record p. 13; that the plaintiff received workers' compensation from the Kemper Insurance Company ("insurer"), Finding 2, Record p. 13; that, "[b]y virtue of a settlement reached in August of 1986, a negligent third party was required to pay an award of damages to the [plaintiff]," and that, "[u]nder the terms of this agreement, the [insurer] waived its . . . lien and was relieved of making future indemnity payments to the [plaintiff]," Finding 3, Record p. 13; that the plaintiff "did not repay to the [insurer] the . . . [b]enefits which it had paid to him," Finding 4, Record p. 13; that the disability benefits the plaintiff received through October, 1986 "are subject to reduction" due to his receipt of workers' compensation payments, Finding 5; Record p. 13; that the plaintiff is not entitled to a refund of his offset benefits, Finding 6, Record p. 13; and that, beginning in November, 1986, the plaintiff's disability benefits "are not subject to offset," Finding 7; Record p. 13. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the Secretary. 20 C.F.R. ' 404.981; *Dupuis v. Secretary of Health & Human Services*, 869 F.2d 622, 623 (1st Cir. 1989).

This case presents a question of statutory interpretation. Because this is an issue which does not implicate the special administrative expertise of the Department of Health & Human Services, deference to the Secretary's legal conclusions is not necessary. See *Mayburg v. Secretary*, 740 F.2d 100, 105-07 (1st Cir. 1984); *Lemire v. Secretary of Health & Human Services*, 682 F. Supp. 102, 103 (D.N.H. 1988). This court's review is governed by the general principle that the Social Security Act is

remedial and should be broadly construed in favor of beneficiaries. *McCuin v. Secretary*, 817 F.2d 161, 174 (1st Cir. 1987).

The statute at issue here, 42 U.S.C. ' 424a(a)(2), provides in relevant part that, in any month, if an individual eligible for Social Security disability benefits is also eligible for ``periodic benefits on account of such individual's total or partial disability (whether or not permanent) under a workmen's compensation law or plan of . . . a State," then that individual's Social Security disability benefit is reduced according to the formula contained in the statute. 42 U.S.C. ' 424a(a). Although the statute does not address the retroactive removal of the offset where the plaintiff, as the result of a recovery in a third-party action, is required to reimburse the insurer, the Secretary does so in POMS DI 11501.045 entitled, ``Special Situations When Offset Does Not Apply." This section states in relevant part:

D. Third Party Settlements

In some cases, [workers' compensation] is awarded for an injury caused by or contributed to by the action or negligence of a third party (i.e., not the employer). The worker, [workers' compensation] agency or insurance carrier either singly or jointly may file suit and recover amounts for which the third party is liable. If the lawsuit results in the worker being awarded payments from the negligent party, he may be required to repay the [workers' compensation] to the insurance company or State. This results in the worker's (sic) being in the same position he would have been in had he never received [workers' compensation] but had simply sued for personal injuries. In such a case, offset will not apply and will be removed retroactively when evidence is submitted showing the results of the settlement and that repayment had been made. Only that part of the [workers' compensation] which is actually repaid by the worker out of the third party settlement is excluded from the offset.

POMS Section DI 11501.045D. This policy is consistent with the congressional intent that the offset provision reduce ``the duplication inherent in the [Social Security and state workers' compensation] programs and at the same time allow[] a supplement to workmen's compensation where the state payments [are] inadequate." *Richardson v. Belcher*, 404 U.S. 78, 83 (1971).

The plaintiff claims that his payment of approximately \$65,905³ in attorneys' fees from his recovery in a third-party action constitutes actual repayment of workers' compensation within the meaning of the POMS because, according to the plaintiff, the insurer was legally obligated to pay this fee.

³ All figures have been rounded to the nearest dollar.

The facts underlying this appeal are not in dispute and can be briefly summarized. The plaintiff was injured while working on a construction job in New Hampshire. He applied for and received workers' compensation benefits under the laws of the State of New Hampshire and also applied for Social Security disability benefits. Record pp. 11, 66. The Secretary determined that the plaintiff was entitled to disability benefits beginning August 19, 1981 but that his benefits were required to be offset by the amount of his workers' compensation benefits pursuant to 42 U.S.C. ' 424a(a)(2). *Id.* Subsequent to this determination the plaintiff brought a third-party suit against the engineering firm which was responsible for supervising the construction project on which he was injured. Record pp. 11, 66-67. The insurer, which had been paying workers' compensation benefits to the plaintiff, became an intervening party in the third-party litigation since it had a lien, pursuant to New Hampshire's Workers' Compensation Law, N.H. Rev. Stat. Ann. ' 281:1 *et seq.*,⁴ on any recovery the plaintiff might have from the engineering firm. Record pp. 11-12, 67. *See also Bilodeau v. Oliver Stores, Inc.*, 352 A.2d 741 (N.H. 1976) (lien created by N.H. Rev. Stat. Ann. ' 281:14 applies to those payments to be made in the future as well as those payments already made). The parties reached a structured settlement which provided for the payment in cash by the defendant to the plaintiff of \$60,000, as well as additional monthly payments of \$1,102 for 15 years (having a then present value of \$110,000); direct payment by the insurer to the plaintiff's attorneys of \$15,000 toward total attorneys' fees and the insurer's waiver of its lien against the third-party settlement ``in recognition of [its] being excused from paying further attorney fees for its full benefit under this settlement, including [its] being excused from paying any future workers' compensation indemnity benefits." Record p. 42. The settlement also asserted as a fact on which the insurer's contribution was negotiated that the plaintiff's

⁴ Effective July 1, 1989, this chapter was repealed and replaced by N.H. Rev. Stat. Ann. ' 281-A:1 *et seq.*

counsel was entitled to a one-third attorneys' fee ``as compensation for any lien recovery to the [insurer]," and that this fee was to be ``based upon a third of benefits paid to date *and* future benefits to which [the insurer] was exposed."⁵ *Id.* (emphasis in original). As a result of the settlement, approved by the court on August 26, 1986, Record pp. 46-48, ``upfront cash" amounted to \$75,000 (\$60,000 from the defendant engineering firm plus \$15,000 from the insurer) from which the attorneys' contingency fee and other expenses in the total amount of \$65,905 were to be deducted before disbursement to the plaintiff, Record pp. 43, 47. Thus, the plaintiff received net cash of \$9,095 plus an entitlement to monthly payments of \$1,102 for 15 years without reduction for further fees or expenses. *Id.*

I first address whether the plaintiff's claim fits within the specific circumstances outlined in the POMS. The POMS states that the offset will be removed retroactively ``when evidence is submitted showing . . . that repayment [of the workers' compensation to the insurer or state] has been made." POMS DI 11501.045D. The POMS further states that ``[o]nly that part of the [workers' compensation] which is *actually repaid by the worker out of the third party settlement is excluded from offset.*" *Id.* (emphasis added). The settlement agreement provides, however, that the insurer waives repayment. Thus, on its face the settlement agreement precludes the plaintiff's exclusion from the offset as directed by the POMS.

I further determine, however, that, even if the plaintiff's assumption of a legal obligation owed by the insurer, *i.e.*, the duty to pay attorneys' fees, could be deemed an *actual* repayment, the plaintiff has not demonstrated that such was the case here. The plaintiff relies on a provision of the New

⁵ The settlement agreement calculates the amount of the insurer's future indemnity exposure based on the plaintiff's life expectancy of 31 years as \$272,428. Record p. 42.

Hampshire workers' compensation law which states that the workers' compensation insurance carrier, which under the statute has a lien on the amount of damages recovered by the employee in a third-party action, is required to bear its ``pro rata share of expenses and costs of action as determined in paragraph IV hereof." N.H. Rev. Stat. Ann. 281:14 I. Paragraph IV provides:

Whenever there is a recovery against a third person under any of the preceding paragraphs, the labor commissioner or the superior court, as the case may be, shall order such division of expenses and costs of action, including attorneys' fees, between employer, or employer's insurance carrier, and employee as justice may require.

N.H. Rev. Stat. Ann. 281:14 IV. The plaintiff argues that the court-approved settlement provides evidence of the insurer's duty to pay the full attorneys' fee paid by the plaintiff; that the plaintiff's payment of these fees conferred a benefit on the insurer in that amount; that, as such, it constitutes an actual repayment of the \$54,639 in workers' compensation benefits which the insurer paid to the plaintiff; and that, therefore, the plaintiff is entitled to have the offset retroactively removed and his offset Social Security disability payments restored.⁶

⁶ I note that the plaintiff appears now to be arguing that his payment of attorneys' fees constitutes only a partial repayment to the insurer. He does not provide any figures on what this amount is, but states only, ``to the extent that Kemper Insurance Company received a benefit from the settlement, that amount be used to *reduce* the Workers' Compensation offset retroactively and a *portion* of Plaintiff's offset Social Security Disability benefits should be restored." Plaintiff's Supplemental Memorandum of Law at 5-6 (emphasis added).

I conclude that neither the New Hampshire statute nor the settlement agreement and order approving the settlement support the plaintiff's claim. I first address the provision for the division of attorneys' fees set forth in N.H. Rev. Stat. Ann. 281:14. In *Bean v. Miller*, 122 N.H. 681, 448 A.2d 424 (1982), the Supreme Court of New Hampshire determined that the underlying purpose of the statute requiring a division of attorneys' fees where an insurer has recovered its lien is ``that the costs spent by an employee to recover damages from a third party ultimately inure to the benefit of the employer's insurance carrier." *Id.*, 448 A.2d at 425. In *Del Rio v. Northern Blower Co.*, 574 F.2d 23, (1st Cir. 1978), the Court of Appeals for the First Circuit interpreted N.H. Rev. Stat. Ann. 281:14 as requiring a pro rata share of attorneys' fees *unless* under the circumstances pro rata apportionment would be unjust. *Id.* at 27. The court provided an illustrative list of such circumstances:

In any particular case the party in charge of the suit, whether the insurer or the employee, may have obligated itself to an excessive counsel fee, or have incurred unnecessary expenses. Or, an insurer might, without justification, put the suing employee to expense that otherwise could have been avoided, for example by refusing to make available information obtained as a result of its independent investigation. Conversely, a party might have contributed, without charge, something beneficial, for which it should be credited. The insurer, for example, might have furnished expert evidence.

Id. The court concluded that the duty of the court in determining counsel fees is ``simply to make the pro rata apportionment fairly." *Id.* at 28. Neither *Bean* nor *Del Rio*, however, addresses the situation in this case where the insurer waived recovery of its lien and all the parties agreed on a division of fees.

The order approving the settlement in this case stated, in relevant part:

Kemper Insurance Company, which has a workers' compensation lien pursuant to RSA 281:14 I (Supp. 1985), is to pay \$15,000 of the total attorney's fees to plaintiff's attorneys and waive its lien, totaling \$54,639.52 through July 14, 1986, and in consideration thereof is excused from paying further attorney's fees and from any future

workers' compensation indemnity benefits. Kemper is otherwise to be liable only for future medical expenses as allowed by law.

Record pp. 46-47. The plaintiff does not argue that the court's order approving the settlement was unfair. Rather, the plaintiff argues that the settlement agreement shows that the insurer was required to pay a greater share of attorneys' fees than the \$15,000 it contributed so that its waiver equaled the attorneys' fees owed. This alleged obligation, according to the plaintiff, derived from the agreement's statement of facts on which the insurer's contribution to settlement was based. That section states that the insurer's future indemnity exposure was computed at \$272,428⁷ and also states that the plaintiff's counsel was entitled to a one-third attorneys' fee as compensation for any lien recovery to the insurer and that said fee was based both upon a third of benefits paid to date and future benefits to which the insurer was exposed. Record p. 42. These statements were not contained in the court order approving the settlement agreement. Moreover, the insurer waived its right to any future lien in exchange for a release from having to pay future indemnity benefits. The agreement's statement that the plaintiff's counsel was entitled to a one-third attorneys' fee on any lien recovery did not impose any legal obligation on the insurer to pay fees in addition to the \$15,000 to which it agreed because the insurer waived any lien recovery. The record, therefore, fails to support the plaintiff's claim that the insurer had a duty to pay fees in excess of the court-approved \$15,000 payment.⁸

⁷ No present value of such future exposure is stated.

⁸ I note in this regard that the \$15,000 contributed by the insurer was added to the gross settlement receipts. Thus, the one-third contingency fee paid by the plaintiff was based on an amount which

includes the insurer's contribution of \$15,000 in attorneys' fees. The plaintiff seems to be arguing, therefore, that the insurer was legally obligated to pay a one-third contingency fee on an amount which already included a fee it had paid. Such a result clearly was not intended by the statutory provision requiring the insurer to deduct from its lien *recovery* its pro rata share of costs.

Finally, I observe that, even if this court were permitted to take a view of the POMS as requiring at the very least that the plaintiff be in the same position he would have been in if he had never received workers' compensation, but had simply sued for personal injuries, he still fails to meet the test. The plaintiff received \$54,640 in workers' compensation benefits plus \$4,657⁹ in Social Security disability benefits. In addition, the plaintiff received from the third-party settlement \$9,095 in upfront cash plus future payments to be made by the defendant in the third-party action having a present value at the time of settlement of \$110,000. Record p. 43. Thus, in total the plaintiff has received \$178,392. If the plaintiff had never received workers' compensation he would have received a total of \$161,492 (\$42,397 in disability benefits plus \$119,095 as the present value of his net recovery in the third-party action).¹⁰ Thus, the plaintiff is requesting reimbursement even though he has actually received \$16,900 more than he would have had he received full Social Security benefits and the same recovery in a personal injury action. Even the most expansive reading of the POMS does not require such a result.¹¹

For the foregoing reasons, I recommend that the Secretary's decision be **AFFIRMED**.

⁹ The amounts that the plaintiff actually received in disability benefits and would have received without the application of the offset are based on figures supplied by the Secretary in a post-hearing submission requested by the court.

¹⁰ Indeed he might have netted even less in such a scenario because there would have been no third party to contribute to the settlement.

¹¹ The plaintiff notes that in some situations a claimant might actually repay part of the workers' compensation lien and thus would still be in a better position than if he had never received workers' compensation. In such a situation the plaintiff argues that the claimant would still be entitled to reimbursement of benefits in proportion to the amount that he paid back. The POMS does appear to envision such an outcome in stating that only the amount that is actually repaid is excluded from the offset. This case, however, in which the plaintiff has not actually repaid any benefits to his employer or the insurer, does not present such a situation.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 2nd day of April, 1990.

***David M. Cohen
United States Magistrate***